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Executive Clemency and the Death Penalty

Winthrop Rockefeller

*Editor's note: The author of this commentary is a former governor of Arkansas. On December 29, 1970, he demonstrated his steadfast opposition to the death penalty by commuting the sentences of all 15 men on Arkansas's death row.**

Recent years have witnessed a growing current of public feeling against the death penalty. Most of this public reaction has manifested itself in the form of court cases.¹ Different groups have backed condemned men in their efforts to have the courts declare the death penalty void on a number of legal theories. This almost exclusive reliance on the courts is unfortunate. It emphasizes lawyers and legal theory when the real question is one of people and morals. My experience in Arkansas demonstrates that *people* are ready to take the action necessary to abolish capital punishment. The public reaction to my mass commutation of death sentences was decidedly favorable. Letters and telegrams from Arkansans supporting my action exceeded opposing letters three to one. Nationally and internationally the ratio of support was four to one. Governors of several other states were among those commending the action.

This positive reaction indicates that the case against capital punishment is supported by the people.² The burden of abolishing it should not be left only to the Supreme Court. The actions of the legislative and executive branches can and should more readily reflect the public sentiment. Capital punishment has already been abolished or severely restricted by legislation in 14 states.

* See New York Times, Dec. 30, 1970, § A, at 26 col. 1.

1. Two recent Supreme Court cases, *McGautha v. California* and *Crampton v. Ohio*, 402 U.S. 183 (1971), are the most conspicuous examples. These cases did not attack the death penalty directly, but rather challenged the trial procedures by which the jury arrived at that sentence.

The United States Court of Appeals for the Fourth Circuit recently voided the death sentence of a convicted rapist. It held that since the victim's life was not endangered, the sentence was grossly out of proportion to the offense and thus was an infliction of "cruel and unusual punishment" in violation of the eighth amendment of the United States Constitution. *Ralph v. Warden*, 438 F.2d 786 (4th Cir. 1970). Cf. *Rudolph v. Alabama*, 375 U.S. 889 (1963) (Goldberg, Douglas, and Brennan, JJ., dissenting from denial of certiorari). See note 17 *infra*.

2. Since my position on capital punishment was well known prior to my becoming Governor in 1966, my election might serve as another indication of the people's sentiments in this area.

Surely the public attitude will eventually be expressed with sufficient strength to the remaining state legislatures for them to change the law. But the legislative process takes time to catch up with the public sentiment,³ and meanwhile men and women wait on death row. The fate of these people can be altered by the use of a device that has been virtually ignored as a means of abolishing the death penalty—executive clemency.

Some would characterize executive clemency as little more than grace, to be bestowed by a governor on the basis of personal whim or caprice. This view is totally wrong. In a civilized society such as ours, executive clemency provides the state with a final deliberative opportunity to reassess the moral and legal propriety of the awful penalty which it intends to inflict. This position is not revolutionary or farfetched. In more than one nation all death sentences *must* be reviewed by the chief executive.⁴

The power to pardon is historically interwoven with the power to administer justice.⁵ Since the law itself creates the executive clemency process, it is nonsense to argue that a governor has taken the law into his own hands when he avails himself of this procedure.

In Arkansas, the state Constitution vests the "Power to grant reprieves, commutations of sentences and pardons after convictions" in the governor.⁶ Only in cases of treason does the chief executive need the advice and consent of the state Senate. This power to pardon is absolute. At his discretion, the

3. Despite wide popular support, bills calling for abolition of the death penalty were defeated in the Arkansas General Assembly in both the 1967 and 1969 sessions. Several bills concerning the death penalty are presently before the United States Congress. Two House bills would "abolish the death penalty under all laws of the United States." H.R. 193, 92d Cong., 1st Sess. (1971); H.R. 3243, 92d Cong., 1st Sess. (1971). Another House bill, H.R. 8414, 92d Cong., 1st Sess. (1971), proposes that the death penalty be suspended for two years during which Congress should investigate and consider three "serious questions": (1) Does "the infliction of the death penalty [amount] to cruel and unusual punishment"? (2) Is it "inflicted discriminatorily upon members of racial minorities, in violation of the fourteenth amendment"? and (3) Should Congress "exercise its authority under section 5 of the fourteenth amendment to prohibit the use of the death penalty"?

For a discussion of other legislative action, both state and federal, see DiSalle, *Trends in the Abolition of Capital Punishment*, 1 U. TOLEDO L. REV. 1 (1969).

4. DEP'T. OF ECONOMIC AND SOCIAL AFFAIRS, UNITED NATIONS, CAPITAL PUNISHMENT 95 (1968). Canada has an automatic executive review process. The power to grant executive clemency is vested in the Governor-in-council of the national government. He is assisted by the Ministry of Justice which is responsible for gathering and sifting all relevant information so that the Governor-in-council may review the case with full knowledge of its social context as well as its judicial history. See generally Sheldon, *Administrative Review and Capital Punishment: The Canadian Concept*, 27 AM. J. CORR. 24 (1965). According to the Canadian Embassy in Washington, D.C., this process has resulted in an automatic commutation of all death sentences to life imprisonment. The last execution was in 1962.

5. The history of executive clemency is treated in Note, *Executive Clemency in Capital Cases*, 39 N.Y.U.L. REV. 136 (1964). See also Ringold, *The Dynamics of Executive Clemency* 52 A.B.A.J. 240 (1966); C. JENSEN, *THE PARDONING POWER IN THE AMERICAN STATES* (1922).

6. ARK. CONST., art. 6, § 18.

governor may establish rules and regulations to govern mechanical processes for bringing specific cases to his attention.⁷ Moreover, within his authority to grant an absolute pardon, he can act in such a way as to grant any part of a request. The governor may grant partial relief in the form of conditional pardon; a limited reduction in sentence releasing an inmate at a later date; or commutation of a death sentence to life imprisonment.

Such discretionary power residing in the hands of a single individual is not unparalleled within our own judicial system. Truly enormous discretionary powers reside, within our criminal system, in the office of prosecuting attorney. On a day to day basis prosecutors make vital decisions concerning alleged commissions of crimes. First, they must determine whether or not to prosecute? Then, what charge to prefer? If the charge is potentially capital according to the laws of the state involved, they must decide whether to seek the ultimate punishment—the death penalty or a lesser sentence.⁸

Because he is mortal, the prosecutor is guided by factors not technically admissible as evidence. What kind of person does he think he is dealing with? How does the public feel; or how does he think the public feels? What are the chances for a conviction? At some point the prosecuting attorney must make his decision, and the die is cast.

This is the system we have, and I am not proposing that we change it. Rather, the role of prosecuting attorney is cited to help bring into focus the awesome responsibility of a governor in exercising his own constitutional authority.⁹

The lack of understanding that surrounds the exercise of executive clemency unquestionably has influenced the thinking of many public officials, including

7. For a discussion of the clemency process in other American jurisdictions, see Note, *Executive Clemency in Capital Cases*, 39 N.Y.U. L. REV. 136 (1964). See also U.S. DEP'T OF JUSTICE, ATT'Y GEN'S SURVEY OF RELEASE PROCEDURES, Vol. 1 (1939).

8. The prosecutor's latitude is widened even further by his low profile. His exercise of discretion is not likely to get as widespread notice as is the governor's; therefore he is not limited by public opinion to the extent that the governor is. See generally B. GROSMAN, *THE PROSECUTOR* (1969); F. MILLER, *PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME* (1969); K. DAVIS, *DISCRETIONARY JUSTICE* (1969); F. REMINGTON, D. NEWMAN, E. KIMBALL, M. MELLI & H. GOLDSTEIN, *CRIMINAL JUSTICE ADMINISTRATION* 413-75 (1969).

9. In Arkansas, as in most American states, the local prosecutors are elected. Their decisions as to charge, tactics, and requested sentence are not subject to the supervision of the governor or any other state official. See ARK. CONST., art. 7, § 24; ARK. STAT. ANN., tit. 24 (1964). See generally, TASK FORCE ON ADMINISTRATION OF JUSTICE, THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 73 (1967); Nedrud, *The Career Prosecutor*, 51 J. CRIM. L.C. & P.S. 343 (1960). The independence of the local prosecutor, its advantages and disadvantages, is discussed in TASK FORCE REPORT: THE COURTS, *supra* at 76-78. The same topic was discussed by the Wickersham Commission in 1931. NAT'L COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON PROSECUTION (1931). See also THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 47-49 (1967).

some of those in whom the authority has been duly vested. I have talked with more than one governor who felt serious misgivings about exercising executive clemency in the case of the death penalty, the suggestion being that here somehow was an excessive use of authority, tantamount perhaps to a breach of the public trust. The truth is, in this country we have never established the use of executive clemency in capital cases for its own rightful consideration. It has been held in obscurity for use only near the end of the long legal road between arrest and execution of sentence. While other countries have pursued it extensively,¹⁰ executive clemency in the United States has been reserved for the rare exception.¹¹ That many governors of other states went out of their way to commend my broad exercise of executive clemency attests to their regard for its "uniqueness" and points out dramatically the need for a re-evaluation of its use and purpose.

From my conversations and correspondence with other governors, I am convinced that most if not all of them, while awaiting either legislative or judicial relief will continue the philosophy of the moratorium on the exercise of the death penalty which I instituted on taking office in 1967. I believe that the same repugnance to capital punishment exists in the hearts and minds of most private American citizens. Since Luis Monge died in Colorado's gas chamber in 1967, no prisoner has been put to death in the United States, and still no great outcry from the people has arisen. This provides a compelling indication of this public repugnance. The people are content with a *de facto* elimination of barbarism as a tool of American justice.¹²

Fundamentalists can cite justification on the overall question of propriety in capital punishment. Indeed, many people cling to the belief that this is a morally correct procedure; we are all familiar with passages in the Old

10. See, e.g., the Canadian procedure cited in note 4 *supra*. In Belgium and Luxembourg, the death penalty has been effectively abolished by use of executive clemency. All death sentences are commuted. DEP'T OF ECONOMIC AND SOCIAL AFFAIRS, UNITED NATIONS, CAPITAL PUNISHMENT 49 (1962). See also Patrick, *The Status of Capital Punishment: A World Perspective*, 56 J. CRIM. L.C. & P.S. 397, 405 (1965).

11. One notable exception to this was provided by Oregon's Governor Robert D. Holmes in the late 1950's. His personal opposition to the death penalty led him to commute the death sentences of everyone condemned during his term. In one instance, Governor Holmes' action was challenged in court. The parent's of a victim of a murderer asked the Supreme Court of Oregon to enjoin the governor from commuting the death sentence. The court refused stating: "The courts have no authority to inquire into the reasons or motives which actuate the Governor in exercising the power [of executive clemency]." *Eacret v. Holmes*, 215 Ore. 121, 124, 333 P.2d 741, 744 (1958).

This courageous leadership by Governor Holmes played a large role in developing the public attitude which led the people of Oregon to abolish capital punishment in 1964. See Ringold, *The Dynamics of Executive Clemency*, 52 A.B.A.J. 240, 242 (1966).

12. The following table gives a clear indication of the trend in executions.

Testament which support this.¹³ Nevertheless, it is true that many a fundamentalist citizen finds his attitude toward an individual case softening with the passage of time.

A survey was taken in an Arkansas delta community, the area in which one of the 15 men whose death sentences I commuted had lived. Six years after the crime the survey showed that approximately 65 percent of the people favored sparing the condemned man's life. He is black, and his conviction was for the rape of a white woman. Yet as time passed, fewer and fewer residents of the community could see any value in taking the man's life.

I wonder how many scheduled executions would have ever been carried out, no matter how fundamentalist or emotional a local community might have been at the time of the crime, if the decision on death sentences were arbitrarily delayed for a period of five or ten years; and if then, guided only by the record before and after the crime, a dispassionate panel of jurors would issue a sentence of death.

The recent Supreme Court decisions in *McGautha v. California*¹⁴ and

EXECUTIONS IN THE UNITED STATES—1930-1969

Year	No.	Year	No.	Year	No.	Year	No.
1930	155	1940	124	1950	82	1960	56
1931	153	1941	123	1951	105	1961	42
1932	140	1942	147	1952	83	1962	47
1933	160	1943	131	1953	62	1963	21
1934	168	1944	120	1954	81	1964	15
1935	199	1945	117	1955	76	1965	7
1936	195	1946	131	1956	65	1966	1
1937	147	1947	153	1957	65	1967	2
1938	190	1948	119	1958	49	1968	0
1939	160	1949	119	1959	49	1969	0

Sources: F. INBAU, J. THOMPSON, & C. SOWLE, *CRIMINAL JUSTICE* 450 (3d ed. 1968). (1930-1966 figures). U.S. Dep't of Justice release, May 16, 1969 (1967-1969 figures).

13. See, e.g., *Genesis* 9:6; *Exodus* 21:12, 22-25. But cf. *Romans* 12:19; *Matthew* 5:30-39. The leaders of major churches in the United States are, however, nearly unanimous in their opposition to the death penalty. Thirteen religious groups have submitted an amicus curiae brief to the Supreme Court in the cases cited in note 17 *infra*. These religious groups state that judicial procedures condemning an accused "are beyond man because man is man, imperfect in experience, imperfect in wisdom, imperfect in understanding his fellow man." *The Washington Post*, Aug. 28, 1971, § C, at 10, col. 1.

14. 402 U.S. 183 (1971).

*Crampton v. Ohio*¹⁵ produced a deep surge of apprehension in many quarters.¹⁶ After more than three years without an execution in this country, the means for maintaining suspensions in many cases were abruptly removed. Most will agree now that the Court's subsequent decision to review the basic constitutionality of the death penalty on the basis of cruel and unusual punishment¹⁷ has, for another interval, removed the heaviest pressure.

It is incomprehensible that the "cruel and unusual" aspect of the death penalty in our system of dealing with capital offenders can be denied. One of the condemned men whose sentence was commuted had been on Arkansas's death row for 12 years, another had been there nine years, three others for eight years each. A third of these condemned men had spent a total of 45 years living, if that is the word, under the sentence of death. This situation is not untypical among the United States' death row population of nearly 700 persons, who are understandably and appropriately referred to as the "living dead" in America's prisons. When I became governor, the death row cells at Tucker Prison Farm were literally big iron boxes, measuring 9 x 9 ½ feet—three sides solid metal and the fourth a wall of bars running from floor to ceiling. For exercise some prisoners chinned themselves on the bars, some did sit-ups and push-ups. All of them walked, five short steps one way and five steps back the other. Once a year, at Thanksgiving or Christmas, the warden let each man out of his cell long enough to trot up and down the "yard"—in reality nothing more than the corridor running the length of the cell row. These traditional exercise sessions never exceeded 15 minutes, and few were of that duration.

It is not an emotional statement to observe that this treatment of prisoners is cruel and unusual punishment. And yet having visited death row many times, I know that the physical environment is of relative unimportance to the people warehoused therein. Frightful as these conditions are (I will be told that things

15. *Id.*

16. In *McGautha*, the Court upheld the death penalty set by a California jury in a bifurcated trial. *McGautha* had argued that leaving the penalty to the absolute discretion of the jury, with no standards to govern imposition of the death penalty, was unconstitutional. The court, in *Crampton*, refused to require Ohio to bifurcate trials in capital cases. The opposite result in either case, if it were given retroactive effect, would have invalidated the sentences of nearly all the men and women on death row in the United States.

17. In the spring of 1971, the Supreme Court granted certiorari in three cases: *Furman v. Georgia*, 225 Ga. 253, 167 S.E.2d 628 (1969), *cert. granted*, 91 S. Ct. 2282 (1971) (No. 5003, 1969 Term; renumbered No. 5059, 1970 Term); *Jackson v. Georgia*, 225 Ga. 790, 171 S.E.2d 501 (1969), *cert. granted*, 91 S. Ct. 2287 (1971) (No. 5030, 1969 Term; renumbered No. 5133, 1970 Term); *Branch v. Texas*, 447 S.W.2d 932 (Tex., 1969), *cert. granted*, 91 S. Ct. 2287 (1971) (No. 5031, 1969 Term; renumbered No. 5135, 1970 Term). The petitions were limited to the question: "Does the imposition and carrying out of the death penalty in [these cases] constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?"

are "much better" on other death rows), the unspeakable aspect is in each morning's awakening thought: "Will somebody this day sign his name to a document officially setting the date of my death?" Day in and day out, this is the constant specter, merely changing form as the hours edge by until in the evening the question becomes, "Will it be tomorrow?"¹⁸

If we are hell-bent on exterminating an individual whom we judge has no place in society, not even in a prison society, then let us follow the example of the city pound and do the deed humanely within three days. If, in our wisdom, death is decreed to be the unalterable fate of certain social misfits, then how can we deny euthanasia to our God-fearing law-abiding neighbor who is suffering helplessly in the terminal stages of incurable illness? *This is not to espouse euthanasia*. Rather it serves to point out that we must break out of this vengeful impasse which seeks solutions to the problems of Man against Society in the collective retribution of Society against Man. What we have in reality is Society admitting defeat and working against itself. We must do better.

Historically, the exercise of executive clemency has provided a form of moral leadership that has brought about substantive changes in the law. In medieval English law, self-defense was not an acceptable plea to the charge of homicide. This had to be changed. After pardons in self-defense cases became established practice, the law itself incorporated the same logic.¹⁹

In Arkansas, back in the 1900's, Governor George W. Donaghey dealt the death blow to an outrageous system through which politicians and their friends made money by leasing convicts to contractors, railroads and planters. Governor Donaghey pardoned 361 convicts at one time, and his action aroused so much public support that the General Assembly in the following year did away with the prisoner lease system.

No governor can legally bind the hands of his successors, but with a little creative thinking he can lend an enduring quality to certain of his actions. Under my administration we dismantled the Arkansas electric chair. It is my understanding that the death row inmate who voluntarily performed that chore reported soon after that some of the chair's essential parts had become

18. After the *Crampton* and *McGautha* decisions, Richard C. Welch, waiting in the San Quentin death house since 1968 for the killing of a hitchhiker, described a new intensity in his environment: "A slow change has come over the men. They are quieter at night . . . and the fact that some of them have no hope [if they get execution dates] creeps subtly into their conversation" Welch, *San Quentin's Death House*, New York Times, July 23, 1971, § M, at 31, col. 7.

19. The defense of insanity and special treatment of juveniles also received impetus from consistent exercise of executive clemency See Note, *Executive Clemency in Capital Cases*, 39 N.Y.U.L. Rev. 136, 188 (1964).

misplaced. Anticipating such a possibility, we fired the executioner in advance. The killing room itself was converted into an infirmary. I am confident that the man who succeeded me in office approved of my actions and has no intention of reversing them. In fact, without fanfare, he has already commuted one death sentence.

Executive clemency has served as a legitimate and effective instrument of change in the past. Looking at the monumental backlog of condemned humanity on the death rows of America today, I believe that executive clemency can lead to a great step forward in human progress. The challenge is to defer the meaningless destruction of human life; and then to advance toward that hour when we finally put aside the dehumanizing notion that the solution to the problem of violent crime is to inflict ourselves the ultimate violence of which man is capable.

There is agreement within those disciplines whose concern is crime and punishment that capital punishment is not a deterrent to crime. Indeed, compelling arguments can be made that by its very existence capital punishment serves reverse purposes:²⁰ In the case of the tormented individual who is looking for a vengeful society to accommodate his own death wish; even more importantly, in our self-delusion that capital punishment represents the ultimate social protection. Therefore, in getting rid of the individual symptoms, we do not energetically pursue the underlying causes of violent crime. This course guarantees their repetition.

Just as we have not found cures for the dreaded disease of cancer, we have not found cures for the criminally psychotic. Tragically, there are those in each category who will not recover. The criminal psychotic must be removed from society; and one day the Divine Power will give our learned men the knowledge to effectuate lasting cures. The effort is proceeding. It involves many eminent psychiatrists individually, and growing group efforts in forensic medicines.

Yet in sharp contrast to the criminally psychotic, many individuals now on death row—albeit guilty of crimes of violence—are demonstrably capable of rehabilitation. From my experience, I would plead with those who devote so much energy to demanding capital punishment to divert their efforts and resources away from emotional extermination toward the salvation of man through constructive rehabilitation.

20. Professor Thorsten Sellin, probably the most widely respected authority on capital punishment, has concluded "that the death penalty, as we use it, exercises no influence on the extent or fluctuating rates of capital crimes. It has failed as a deterrent." T. SELLIN, *THE DEATH PENALTY* 63 (1959). Indeed, in an address before a Canadian Parliamentary Committee in 1956, Professor Sellin said that his research indicated that more murders tend to be committed where the death penalty is in force. Pennell, *Capital Punishment*, 5 ALBERTA L. REV. 167 (1966).

I believe that we must familiarize our elected officials with their responsibilities within executive clemency, encourage them to use it to prevent further deaths, and support them publicly when they thus decide.²¹ This will be a difficult task, extraordinarily so if the Supreme Court ruling to come is not favorable.

The task can be accomplished if the people assert determined pressure on their legislators in removing this disgrace that rests heavily upon our shoulders. I did what I could and will continue to work for my convictions. What earthly mortal has the omnipotence to say who among us shall live and who shall die? I do not. The job can be done. Until then, essential at our moment in history is a greatly broadened understanding and acceptance of the fact that executive clemency, far from being an extra legal device, is an intricate and necessary part of a fair and impartial system of justice.

21. An abolitionist governor could also use his executive powers in the area of extradition to help the cause. For example, he could refuse to extradite a refugee whom the receiving state intended to subject to a capital trial.